IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 186

OHIO TANK CAR COMPANY,
Petitioner,

vs.

KEITH RAILWAY EQUIPMENT COMPANY,
Respondent.

BRIEF OF KEITH RAILWAY EQUIPMENT COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FILED BY OHIO TANK CAR COMPANY, PETITIONER.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Both courts below held that mileage allowances (in excess of the rental price) paid by a lessor of tank cars to its lessee constituted a rebate or discrimination prohibited by Section (1) of the Elkins Act, where the lessee's stockholders through another corporation identically owned by them, were engaged in marketing the petroleum products carried in the cars.

Both courts below concluded that this arrangement was a "device" of the kind prohibited by the Elkins Act.

The petition advances only two grounds upon which petitioner relies for the granting of a writ. The first is that the Elkins Act has not heretofore been construed by this Court with respect to the particular situation presented. The second is that the Court of Appeals, although "rejecting" the finding of the lower court that the payments were "rebates", improperly decided that they were "concessions". Neither of these grounds is sufficient.

First: The decision is clearly in accord with the principles announced by this Court in two decisions which must be considered as controlling. (*Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422, 431 and *Union Pacific Railroad Co.* v. *United States*, 313 U. S. 450, 470). The decision is also in accord with findings of the Interstate Commerce Commission in a field which this Court has said are peculiarly within its administrative function. (*Allowances for Privately Owned Refrigerator Cars*, 201 I.C.C. 323, 383 and *Allowances for Privately Owned Tank Cars*, 258 I.C.C. 371, 376). There is no occasion further to elaborate on the construction of a seasoned statute, the application of which to the instant situation is clearly controlled by principles long settled by this Court. This is particularly true in view of the soundness of the decision below, predicated as it is upon the substance of the situation and not upon any mere matter of form.

Second: Petitioner unduly magnifies the sentence in the opinion of the Circuit Court of Appeals reading (R. 61):

> "Such special allowances to Akin, if made, might not be considered a rebate in the strict sense of the word, but it certainly should be considered as a concession or discrimination in favor of Akin, which others of its competitors did not enjoy".

This cannot be called a "rejection" of the finding of a trial court. In any event Respondent's defense of Petitioner's claim, as well as Respondent's right of recovery on its counterclaim, rested upon a violation of the Act which existed whether the particular device employed resulted in a "rebate", a "concession", a "discrimination", or merely an "advantage".

The statement in the petition contains serious errors of fact. For example it is said that the set-up between petitioner and its affiliate "had been known to Respondent for a number of years" (Pet. p. 4). This is astounding in the light of the letter of petitioner dated January 17, 1942 (R. 34) stating:

> "Wish to advise that the Ohio Tank Car Company and the Akin Gasoline Company have absolutely no connection."

It is also stated that Respondent's former president "knew that the petitioner and Akin shared the same offices and that the secretary of petitioner was also the traffic manager of Akin" (Pet. p. 4). The record contains no evidence of this asserted fact.

There are other inaccuracies, but for present purposes further reference thereto is not essential.

We turn now to a brief consideration of the questions presented by petitioner and the argument thereon in the supporting brief.

As to question 1:

Petitioner challenges the conclusion of the courts below that petitioner and its affiliate corporation should be viewed as one and the same for the purposes of the Elkins' Act. This conclusion does not seem questionable in the light of the observation of the Court of Appeals that by maintenance of the two corporations, petitioner's stock-

holders obtained advantages not otherwise available to them (R. 62). The arrangement was a "device," had that result, and therefore is within the condemnation of the Elkins' Act.

As to question 2:

Petitioner challenges the conclusion that its affiliate Akin was a shipper within the meaning of the Elkins' Act. The stipulated fact is that Akin was a marketer shipping, upon its own routing instructions, petroleum products (purchased by it from refineries) to its customers, on bills of lading signed by it as consignor (R. 24). This Court has repeatedly held that a freight forwarder who acted as consignor was the snipper within the meaning of the Interstate Commerce Act, even though he had no title to the goods consigned by him and even though the consignee paid for the transportation. (*U. S.* v. *Trucking Co.*, 310 U. S. 344, 353; *Louisville and Nashville R.R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 67; *U. S.* v. *Metropolitan Lumber Co.*, 254 Fed. 335, 346; *U. S.* v. *Lehigh Valley R. Co.*, 222 Fed. 685, 686.) No artificial limitation of that category is called for by the circumstances of this case.

It is not, however, necessary to determine whether Akin was a "shipper." The prohibitions of the Elkins' Act apply to "any person, firm or corporation" without reference to whether he (or it) is or is not a shipper; its object is "to place all shippers on equal terms" (*U. S.* v. *Union Stock Yard*, 226 U. S. 286, 308-309).

As to question 3:

Petitioner's third "question" seems to be a combination of the first two. It assumes that it is necessary to find that there is a "shipper" (a point already answered) and it further emphasizes the fact that the marketing affiliate did not pay the freight bills, an immaterial point.

Petitioner here relies upon the case of *Tank Car Corp. v. Terminal Co.*, 308 U. S. 422 (known as the "El Dorado" case) in which this Court said (p. 431):

> "If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or own their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case."

The decision in the *El Dorado* case is the only decision of this Court involving rebates of mileage in excess of rental price of privately owned tank cars. It is not in conflict with the enunciations of the Interstate Commerce Commission on the subject and is not contrary to the decisions of the two lower courts in this case.

As to question 4:

In its statement of this question (Pet. p. 6) petitioner attempts to point out that the relationship of carrier and shipper does not exist between the respondent and the petitioner or petitioner's affiliate and therefore any advantage that may have resulted from the arrangement between the parties is not within the prohibition of the Elkins' Act. In its argument relating to this question petitioner asserts that "there was no violation of the Elkins Act because the situation therein is not reached by the Elkins Act" (Pet. p. 23). This question-begging assertion is obviously unsound and cannot stand in the face of the substance of the arrangements. A concise answer is that:

> "Unlawful rebates, concessions from the published and filed tariffs, and discriminations may be brought

about by the act of a person who is not directly in the relation of carrier and shipper, as well as by payments by the carrier to the shipper directly." (*Allowances for Privately Owned Tank Cars*, 258 I.C.C. 371, 376; see also *Union Pacific Railroad Co.* v. *United States*, 313 U. S. 450, 470; *Spencer & Kellogg & Sons* v. *United States*, 20 Fed. (2d) 459, 460; *United States* v. *Union Stock Yard*, 226 U. S. 286, 308-309).

As to question 5:

Petitioner's fifth "question" has already been answered in the discussion of it as the second reason relied upon for the allowance of the writ prayed.

CONCLUSION.

The judgment of the Circuit Court of Appeals, affirming the judgment of the District Court, is in accord with the decisions of this Court, and the petition for certiorari should be denied.

Respectfully submitted,

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